Supreme Court, U.S.
FILED
MAY 27 1993
OFFICE OF THE CLERK

No. 92-1616

In the Supreme Court of the United States

OCTOBER TERM, 1992

LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board permissibly applied a clear and convincing evidence standard in determining whether two companies assumed the prior employer's collective bargaining agreement when they purchased two apartment complexes.

2. Whether the court of appeals correctly found that the Board, in determining whether the new owners had assumed the prior employer's collective agreement, was not required to give collateral estoppel effect to state court rulings declining to stay arbitration proceedings that the union had initiated against the prior employer and to which the union had added the new owners.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

All State Factors, 205 N.L.R.B. 1122 (1973)	9, 10
EG&G Florida, Inc., 279 N.L.R.B. 444 (1986)	9
Grogan v. *Garner*, 111 S. Ct. 654 (1991)	12
Howard Johnson Co. v. *Detroit Local Joint Executive Bd.*, 417 U.S. 249 (1974)	8
John Wiley & Sons, Inc. v. *Livingston*, 376 U.S. 543 (1964)	7, 11
Metropolitan Edison Co. v. *NLRB*, 460 U.S. 693 (1983)	7, 9, 10
NLRB v. *Babad*, 785 F.2d 46 (2d Cir. 1986)	10
NLRB v. *Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972)	7, 8, 11
NLRB v. *Donkin's Inn, Inc.*, 532 F.2d 138 (9th Cir.), cert. denied, 429 U.S. 895 (1976)	10
NLRB v. *Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987)	6, 12
NLRB v. *Heyman*, 541 F.2d 796 (9th Cir. 1976)	12
NLRB v. *Strong Roofing & Insulating Co.*, 393 U.S. 357 (1969)	10
NLRB v. *Transportation Management Corp.*, 462 U.S. 393 (1983)	9
United Steelworkers v *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)	12

Statutes: Page

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 4
§ 8(a)(3), 29 U.S.C. 158(a)(3) 4
§ 10(c), 29 U.S.C. 160(c) 9
Labor-Management Relations Act § 301, 29 U.S.C. 185 10

Miscellaneous:

Restatement (Second) of Judgements (1982) 12

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1626

LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A14, is reported at 982 F.2d 845. The decision and order of the National Labor Relations Board (Board), Pet. App. B1-B13, including the decision and recommended order of the administrative law judge (ALJ) (Pet. App. B14-B107), is reported at 306 N.L.R.B. No. 72.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1993. The petition for a writ of certiorari was

filed on April 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In late 1986, Field Bridge Associates (Field Bridge) and Rachel Bridge Corporation (Rachel Bridge) agreed to purchase two apartment complexes—Ebbets Field Housing Complex (Ebbets Field) and Washbridge Apartments (Washbridge)—from Cedar York Properties Limited Partnership (Cedar York).[1] Pet. App. B24-B25. At the time of the purchase, the two properties were being managed by Arco Management Corporation (Arco), whose employees were represented by petitioner, Local 32B-32J, Service Employees International Union (the Union). Arco's employees were covered by the terms of a collective agreement between the Union and the Realty Advisory Board on Labor Relations (RAB), a multi-employer group; the agreement was to expire on April 21, 1988.[2] *Id.* at B20-B21, B58. Under the RAB agreement, the collective bargaining units at Ebbets Field and Washbridge included both service and maintenance em-

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[1] Field Bridge purchased Ebbets Field, and Rachel Bridge purchased Washbridge.

[2] Arco had been appointed the management agent of the two properties by the New York Division of Housing and Community Renewal (DHCR). As a result of DHCR's intervention, Cedar York had no contractual relationship with Arco, and did not authorize Arco to enter into the RAB agreement. Pet. App. B21-B22. The sales contract negotiated between Cedar York and the companies purchasing the two apartment complexes provided that any contracts and service agreements relating to the operation or maintenance of the premises that are assumed by the purchaser shall be specified in Schedule I, a form annexed to the contract. *Id.* at B26. Schedule I was left blank and the parties did not enter into a separate written agreement under which Field Bridge or Rachel Bridge would specifically assume the RAB agreement between the Union and Arco. *Id.* at B26, B31.

ployees and security guards in roughly equal numbers. *Id.* at B22.

On July 1, 1987, after taking over operation of the respective properties, Field Bridge and Rachel Bridge retained all of the Arco employees and continued their existing wages and benefits. Pet. App. B32. The new owners, however, ceased remitting dues to the Union and refused to contribute to its health and pension funds. *Id.* at B32-B33, B35-B37. Upon taking over, Field Bridge immediately terminated Arco as management agent, and Rachel Bridge did so a month later. *Id.* at A4.

Sometime in July 1987, the Union met with Field Bridge personnel to discuss signing a collective bargaining agreement. Pet. App. B37. In mid-August, the Union gave Field Bridge the Independent Apartment House Agreement (IAHA Contract), which was not the RAB agreement to which Arco had assented. The Union asked Field Bridge to have its attorney review the contract and return it in a few weeks. *Id.* at B37-B38. In December 1987, Field Bridge met with the Union to negotiate an agreement. At the initial meeting, the Union stated that Field Bridge had not signed an assent agreement to be bound by the RAB agreement. *Id.* at B48-B50. At a subsequent meeting, the Union's attorney stated that Field Bridge could not have the RAB agreement because it had not been assumed within 30 days of closing, as required by Article IX of the agreement. According to Field Bridge, the Union wanted Field Bridge to sign the IAHA contract, excluding guards, retroactive to the date of purchase.[3] *Id.* at B52-B53.

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[3] The parties were in agreement that the Union was not entitled to recognition for a unit including both guards and non-guards. Pet. App. B48.

In late October 1987, the Union sent Rachel Bridge a letter offering it the opportunity to enter into the IAHA contract. The letter also gave Rachel Bridge the option of negotiating a new collective bargaining agreement, but not of signing the RAB agreement. Pet. App. B39-B40. At a subsequent meeting on November 24, 1987, between representatives of the Union and Rachel Bridge, the Union rejected Rachel Bridge's contract proposal and asked Rachel Bridge to sign the IAHA contract. The Union's attorney stated that Rachel Bridge could not have the RAB agreement because the 30-day period for its assumption had expired. No Union representative took the position that Rachel Bridge had assumed the existing RAB agreement when it purchased Washbridge. *Id.* at B42-B43.

On January 14, 1988, the Union tendered a new contract proposal to Field Bridge. Field Bridge rejected the Union's proposal and countered with its own, but no agreement was reached. Pet. App. B54-B55. On the same date, the Union made Rachel Bridge a similar offer. It too was rejected, and no agreement was reached. *Id.* at B45-B46.[4]

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[4] In January 1988, the Ebbets Field employees went on strike. Pet. App. B53-B54. By September 1988, all the Ebbets Field employees had made unconditional offers to return to work. Field Bridge refused to reinstate the strikers at that time, thereby converting the strike into a lockout. *Id.* at B88-B89. The Board affirmed the ALJ's decision that the employees were economic strikers; that Field Bridge was entitled to lock them out in support of its bargaining position until April 10, 1989, when it began to reinstate some of the strikers; but that it violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(3) and (1), by refusing thereafter to reinstate all of the strikers who had offered to return to work. Pet. App. B83-B90. The court of appeals upheld the Board's decision in that respect, *id.* at A13-A14, and the petition does not challenge that ruling.

Meanwhile, in September 1987, the Union agent sought to add Field Bridge as a party to an arbitration proceeding involving an Ebbets Field employee discharged prior to Field Bridge's purchase of that property. Pet. App. B38-B39, B57. Several months later, on December 1, 1987, the Union sought to add Rachel Bridge as a party to an arbitration proceeding involving a Washbridge employee discharged prior to Rachel Bridge's purchase of that property. *Id.* at B40. In both cases the Union had initiated arbitration proceedings under the RAB agreement. Field Bridge and Rachel Bridge sought stays of the arbitrations in New York State Supreme Court. In a proceeding where no witnesses were called, Judge Ira Gammerman, on April 26, 1988, in an oral ruling, agreed with the Union's contention that Field Bridge had assumed the RAB agreement, and he issued an order refusing to stay the arbitration. Field Bridge unsuccessfully appealed Judge Gammerman's decision.[5] *Id.* at B4-B5, B100-B102.

After the state court ruling, Field Bridge advised the Union of its desire to negotiate a successor agreement to the RAB agreement that expired on April 21, 1988. Field Bridge also stated that its notice did not waive "any statutory or procedural recourse available to it" respecting the state court decision. Pet. App. B58. Thereafter, the Union complained to the contract arbitrator that Field Bridge had violated the RAB contract by its subcontracting of guard work. *Id.* at B59. In a final exchange of letters in mid-June, Field Bridge advised that it had not assumed the RAB contract, but that, if "a court or government agency" held to the

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[5] The Union used the judgment against Field Bridge to assert collateral estoppel against Rachel Field's petition to stay arbitration pending before New York State Supreme Court Judge Moskowitz, who gave it preclusive effect. Pet. App. A5, B5, B101-B102.

contrary, it was exercising the contractual cancellation provision. *Id.* at B59-B60. The Union replied that Field Bridge would have to "first recognize the existence of the agreement before it can exercise options thereunder." *Id.* at B60-B61.

2. The Union also filed unfair labor practice charges with the Board against Field Bridge and Rachel Bridge. Based on those charges, the Board's General Counsel issued a complaint alleging, *inter alia*, that the two companies were successors who had agreed to assume the existing collective agreements when they purchased the two apartment complexes. Pet. App. B16-B17.

The Board dismissed the complaint, finding, in agreement with the ALJ, that Field Bridge and Rachel Bridge had not assumed the RAB contract. Pet. App. B10, B63. The Board noted that it required "clear and convincing evidence of consent, either actual or constructive," to find assumption of a collective bargaining agreement. *Id.* at B10. The Board found no "unmistakable written manifestation of [the two companies'] intent with respect to the existing RAB contract." It added that the Union's conduct was inconsistent with an understanding that the companies had assumed the existing contract because the Union had "sought to bind the new owners to the Independent Apartment House Agreement or to negotiate an entirely new agreement." *Id.* at B10-B11, B73-B77.

The Board also concluded that the ALJ properly had refused to give collateral estoppel effect to the decisions of the New York State Supreme Court rejecting the companies' stay of arbitration applications. Pet. App. B4. The Board noted that it "adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully." Pet. App. B5-B6. The

Board distinguished *NLRB* v. *Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987), noting that in that case the existence of a contract was the essence of the issue before both the Board and the court, while in this case the issues before the Board were not the same as those decided by the courts. Pet. App. B8 n.2.

3. The court of appeals concluded that the Board's finding that Field Bridge and Rachel Bridge did not assume the RAB agreement was supported by substantial evidence. Pet. App. A13. In so finding, the court held that the Board properly applied a clear and convincing standard in determining whether the new owners had assumed the contracts. *Id.* at A12. Citing *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 707-709 (1983), the court of appeals noted that the Board may use different standards of proof depending on the kind of finding at issue. Pet. App. A12. The court agreed with the Board that application of the clear and convincing standard gives effect to the admonition in *NLRB* v. *Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972), that a successor employer is not required to assume the predecessor's collective bargaining agreement. Pet. App. A12-A13.

The court of appeals also agreed that the Board was not bound by the decisions of the New York courts. The court did not reach the Board's argument "that the Board can never be precluded on successorship issues by state court findings." Pet. App. A7-A8. Rather, the court concluded that the Union's claim "fails under general principles of preclusion law," in that the issues before the state court and the Board were not identical. *Id.* at A8 & n.1, A11. The court of appeals explained that a successor employer may be bound by the predecessor's agreement to arbitrate without necessarily being bound by the substantive terms of the contract; the arbitrator must determine what other obligations of the contract

were binding on the successor. *Id.* at A8-A10, citing *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964); *Burns*, 406 U.S. at 286. Here, the New York courts found only that Field Bridge and Rachel Bridge had a duty to arbitrate; those courts did not have before them the issue of whether those companies were, in fact, bound by the RAB agreement, the issue decided by the Board. Pet. App. A9-A11.

ARGUMENT

Petitioner contends that the Board applied an incorrect standard in determining whether Field Bridge and Rachel Bridge had assumed the RAB agreement, Pet. 18-26, and that, in any event, the Board was required to give collateral estoppel effect to the two New York state court determinations that Field Bridge and Rachel Bridge were required to arbitrate the question whether they had assumed that agreement. Pet. 26-42. There is no merit to those contentions and they raise no issue warranting review by this Court.

1. A successor employer is obligated to recognize and bargain with the representative of the predecessor's employees, but it is not bound by the predecessor's collective bargaining agreement absent assumption. *NLRB* v. *Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 284 (1972); *Howard Johnson Co.* v. *Detroit Local Joint Executive Bd.*, 417 U.S. 249, 261 (1974). In *Burns*, the Court cautioned that "holding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities."[6] 406 U.S. at 287. Under *Burns*, an as-

[6] The Court explained that "[s]addling [a successor] employer with the terms and conditions of employment contained in the old collective-bargaining contract may make [needed] changes impossible and may discourage and inhibit the transfer of capital." 406 U.S. at 288. The Court added that "a union [that] may have

sumption of a collective bargaining agreement can only come about by mutual consent, evidenced either by a writing or by the conduct of both parties. Consistent with those principles, the Board requires clear and convincing evidence of consent, either actual or constructive, before it will find that an assumption of the contract has occurred. *EG&G Florida, Inc.*, 279 N.L.R.B. 444, 453 (1986); *All State Factors*, 205 N.L.R.B. 1122, 1127 (1973).

Petitioner contends (Pet. 21-24) that, since preponderance of the evidence is the standard for determining whether an unfair labor practice has occurred,[7] the Board may not use a more stringent standard for determining the subsidiary issue of contract assumption. This Court has made clear, however, that the Board may impose a different standard in evaluating particular conduct incident to an unfair labor practice finding, when that is necessary to effectuate the purposes of the Act. In *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693 (1983), the issue was whether the employer had unlawfully discriminated by imposing more severe sanctions on union officials than on other employees for violating a contractual no-strike clause. A subsidiary issue was whether the union could waive the union officials' statutory right not to be disciplined more severely than other employees for engaging in strike activity. While holding that such a waiver was permissible, the Court applied a "clear and unmistakable" standard to determine whether a waiver

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made concessions to a small or failing employer * * * [may] be unwilling to make [concessions] to a large or economically successful firm." *Ibid.*

[7] Section 10(c) of the Act, 29 U.S.C. 160(c), places upon the General Counsel the burden of proving an unfair labor practice by a preponderance of the evidence. See *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 401 (1983).

had occurred. *Id.* at 708. The Court refused to "infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" *Ibid.*

Similarly, "[i]n determining whether an employer has assumed its predecessor's labor contract, the [Board] is not bound by technical rules of contract law; rather, it may adapt those rules to the collective bargaining context." *NLRB* v. *Babad*, 785 F.2d 46, 49-50 (2d Cir. 1986). Accord *NLRB* v. *Donkin's Inn, Inc.*, 532 F.2d 138, 141-142 (9th Cir.), cert. denied, 429 U.S. 895 (1976). As the court of appeals correctly concluded, "[t]he Board's decision to require clear and convincing evidence of consent is one such adaptation"; it gives effect to *Burns*' counsel to exercise "utmost restraint" in finding an assumption.[8] Pet. App. A12, quoting *All State Factors*, 205 N.L.R.B. 1122, 1127 (1973).

2. Petitioner also challenges (Pet. 26-42) the Board policy of refusing to give collateral estoppel effect to issues determined in litigation between private parties. That policy is not squarely at issue in this case. The court of appeals, while acknowledging the force of the Board's position, did not find it necessary to consider it. Instead, the court determined that the Union's collateral estoppel claim fails under general principles of preclusion law because the issues before the Board and the state courts were not identical. Pet. App. A8.

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[8] Petitioner also appears to contend (Pet. 18-20) that the Board is required to apply the same standard in determining contractual issues as would a court in proceeding under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185. This Court, however, has noted that, although the Board's determination of unfair labor practices may involve contract determination, its proceedings and grievance/arbitration proceedings are separate regimes. *NLRB* v. *Strong Roofing & Insulating Co.*, 393 U.S. 357, 360-362 (1969).

The Union does not question the proposition that collateral estoppel is not appropriately applied where the issue in the second tribunal is not the same as that in the first. Accordingly, the only issue presented is whether the court of appeals correctly held that the issues before the courts and the Board were not identical. That fact-based question does not warrant review by this Court. In any event, the court of appeals' finding is correct.

As the court of appeals correctly noted, Pet. App. A9, it does not follow from a finding that an employer is required to arbitrate an issue under a collective bargaining agreement that it necessarily has assumed the substantive provisions of an agreement. In *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964), the Court ruled that a subsequent employer was bound by its predecessor's agreement to arbitrate, *id.* at 547-551, but left for arbitration the question of what other obligations of the collective bargaining agreement were binding on the subsequent employer. As the Court explained in *NLRB* v. *Burns Int'l Sec. Servs., Inc.*, *supra*, *Wiley* held that "the agreement to arbitrate * * * survived the merger and left to the arbitrator * * * the ultimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract." 406 U.S. at 286.

Here, the state courts decided only that Field Bridge and Rachel Bridge were required to join an arbitration proceeding against the old employer concerning discharges that had occurred during the latter's regime. Those grievances did not involve the companies' obligation to pay dues and fringe benefits under the RAB collective bargaining agreement, which the Union sought to enforce through its unfair labor practice charges filed with the Board. In any case, the issue of the companies' obligations under the RAB agreement

would be for the arbitrator.[9] Accordingly, the issue before the courts—whether the companies were required to arbitrate grievances arising under the RAB agreement—and the issue before the Board—whether the companies were required to adhere to all the substantive terms of that agreement—are plainly different issues.[10]

Contrary to petitioner's contention (Pet. 40-42), the holding of the court of appeals does not conflict with *NLRB* v. *Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987), and *NLRB* v. *Heyman*, 541 F.2d 796 (9th Cir. 1976). As the court of appeals correctly noted, in both of those cases "the issue before the federal district court

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[9] In December 1987, the Union filed a grievance with the contract arbitrator against the old owner and Arco asserting that those parties had violated the RAB agreement by selling the Ebbets Field complex to an employer (Field Bridge) that did not, *inter alia*, pay into the Union pension and welfare funds. The Union did *not* name Field Bridge in that proceeding, and only sought damages from the predecessor employer. Pet. App. B50-B52.

[10] Moreover, because, as we have shown (see pp. 8-10, *supra*), the Board properly applies a clear and convincing standard of proof to the assumption issue, collateral estoppel would not apply for that reason as well. The question for the courts is whether there is any plausible basis on which an arbitrator could find assumption. See *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960) ("[d]oubts [about arbitrability] should be resolved in favor of coverage"). A showing of assumption under that lenient standard may well fail to meet the Board's more stringent clear and convincing standard. The difference in standards renders the doctrine of collateral estoppel inapplicable. See *Grogan* v. *Garner*, 111 S. Ct. 654, 658 (1991) (a determination of fraud reached under "the prepondence of the evidence * * * standard * * * could not be given collateral estoppel effect" in a subsequent proceeding in which fraud must be established by clear and convincing evidence; citing Restatement (Second) of Judgments § 28(4) (1982)).

and the issue before the Board were the same."[11] Here, in contrast, "the issues of agreement to arbitrate and of assumption of an entire contract are not the same." Pet. App. A11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

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[11] In *Donna-Lee*, the First Circuit held that the Board was collaterally estopped by a federal district court finding, in a trustee's suit for payment of benefit funds, that no collective bargaining agreement existed between the employer and the union. In *Heyman*, the Ninth Circuit held that the Board was collaterally estopped by a district court order, in a Section 301 suit, rescinding a collective bargaining agreement.